SUPREME COURT, U.S.

No. 282

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

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INDEX

	PAGE
Statement as to consolidated record and appendices	1
Opinions below	3
Jurisdiction	4
Questions presented for Review	4
Statutes involved	6
Statement of the Case	7
Reasons for granting the writ	
I. The prohibition of the Fourteenth Amendment against State action requiring segregation does not require local school boards to affirmatively place certain students in certain schools on some percentage basis with race as the sole criteria for the selection of these students	15
A. This Court has never said so and by implication has said it does not	15
B. Most of the other Circuits have said it does not	23
C. The Court below has heretofore said it does not	25
II. No Court should establish constitutional standards which apply to only some areas of our nation	26
A. An Appellate Court should never assume the existence of facts, evidence of which are not in the Record and particularly where no party litigant has urged the existence of such facts	26

PAGE

III. The formalizing of detailed decrees governing the operation of a local school system should be left to the discretion of the trial court 29

A. The good faith action and progress of this school board should entitle us to a different decree of plan than some other recalcitrant school board elsewhere 29

B. Since this transition may drastically affect the operation and educational quality of our school system, this board should be left relatively free to experiment in this area as it does in other educational areas 31

C. The provision of the decree ordered by the Court below are unconstitutional and/or unnecessarily burdensome and should be vacated 36

D. This school board should not be bound by the decree ordered by the Court below without having been formally consolidated with the other cases before the Court 37

IV. The Fourteenth Amendment does not require a decision which requires a drastic social change which, in all probability, will result in a deteriorated public education system 38

A. This is particularly true when neither the Courts nor professional educators will have any control over such deterioration and the persons whose educational opportunities are here sought to be improved will actually suffer the most 38

PAGE

V. Even if it is educationally desirable to require a deliberate mixing of the races, religions and nationalities in each school, this is a matter for Congressional action and not judicial decree 42

A. It is doubtful if Congress has constitutional authority to so legislate, but even if Congress has such power, it has deliberately refused to enact such legislation and has specifically prohibited same 42

VI. The Court below assume that the Fourteenth Amendment requires faculty desegregation although the only cases dealing with this subject which have reached this Court have been remanded for an evidentiary hearing thereon, which hearings have never been had 43

Conclusion 49

Certificate of Service 50

CITATIONS

PAGE

Avery v. Wichita Falls Independent School District 1956, 241 F.2d 230 25

Bell v. School City of Gary, Indiana 324 F.2d 209 Cert. denied 377 U.S. 924 84 S.Ct. 1223, 12 L.Ed. 2d 216 ..... 21, 23, 26

Denzel Milton Lee v. United States of America, 322 F.2d, 770 26

Borders v. Rippy, 1957, 247 F.2d 268 25

Boson v. Rippy, 1960, 285 F.2d 43 25

Boynton v. Common Wealth of Virginia, 364 U.S. 454 81 S.Ct. 182, 5 L.Ed. 2d 206 17

Bradley v. School Board of City of Richmond, 345 F.2d, 310, 382 U.S. 103 ..... 22, 43

Briggs v. Elliott, 132 F.Supp. 776 ..... 21, 23

Brown v. Board of Education 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 ..... 18, 20

Burton v. Wilmington Parking Authority 365 U.S. 715 81 S.Ct. 856 6th L.Ed. 2d 45 17

Bush v. Orleans Parish School Board, 308 F.2d 491 8

Calhoun v. Latimer 321 F.2d 302 (5th Circuit, 1963) 11, 44

City of Montgomery v. Gilmore, 1960, 277 F.2d, 364 25

Clark v. Board of Education of Little Rock, 369 F.2d, 661 23

PAGE

Cohen v. Public Housing Administration, 1958, 257 F.2d, 73 25

Cooper v. Arron 358, U.S. 1, 78 S.Ct. 1401 19

Deal v. Cincinnati Board of Education 369 F.2d 55 23

East Baton Rouge Parish School Board v. Davis, 289 F.2d 380 (5th Circuit, 1961) Cert. denied 368 U.S. 831 9

Evans v. Ennis 281 F.2d 385 23

Evers v. Jackson, 1964, 328 F.2d 408 25

Goss v. Board of Education of City of Knoxville, Tennessee, 373 U.S. 686, 83 S.Ct. 1405 18

Henderson v. United States 339 U.S. 816, 70 S.Ct. 843 94 L.Ed. 1302 18

Jeffers v. Whitley 309 F.2d 621 .....22, 23

Johnson v. Virginia 373 U.S. 61, 83 S.Ct. 1053.... 17

Lockett v. Board of Education of Muscogeee County, 342 F.2d 225 (5th Circuit, 1965)..13. 25

Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119 .....17, 19

Rippy v. Borders, 1957, 257 F.2d 73 25

Rogers v. Paul 345 F.2d 117, 86 S.Ct. 358 43

Shelley v. Kraemer 334 U.S. 1, 68 S. Ct. 836 92 L.Ed. 1161 18

PAGE

Smith v. Allwright 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 18

Springfield School Committee v. Barksdale 348 F.2d, 261 23

Steele v. Louisville & Nashville R. Co. 18

Stell v. Savannah-Chatham County Board of Education, 1964 333 F.2d 55 25

Strauder v. West Virginia 100 U.S. 303, 25 L.Ed. 664 18

Swann v. Charlotte—Mecklenburg Board of Education 369 F.2d 29 23

United States, et al. v. Jefferson County Board of Education, et al. F.2d 15

Watson v. City of Memphis 373 U.S. 526, 83 S.Ct. 1314 17

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 29, 1966, affirmed on re-hearing on March 29, 1967.

STATEMENT AS TO CONSOLIDATED RECORD AND APPENDIX

In the Court below this case was docketed and argued at the same time as No. 23345, *United States of America and Linda Stout v. Jefferson County Board of*

Education, et al., No. 23331, *United States of America v. The Board of Education of the City of Fairfield, et al.*, No. 23335, *United States of America v. The Board of Education of the City of Bessemer, et al.*, all on appeal from the United States District Court for the Northern District of Alabama and No. 23274, *United States of America v. Caddo Parish School Board, et al.*, No. 23365, *United States of America v. The Bossier Parish School Board, et al.*, No. 23173, *Margaret M. Johnson, et al. v. Jackson Parish School Board, et al.*, No. 23192, *Yvornia Decarol Banks, et al. v. Claiborne Parish School Board, et al.*, No. 23253, *Jimmy Andrews, et al. v. City of Monroe, Louisiana, et al.*, all on appeal from the United States District Court for the Western District of Louisiana.

Although the title of this case appears on the fly leaf of the opinion of the Court below on re-hearing, along with the cases cited above, no motion to consolidate this case with the others has been filed by any party and the Court below has never entered any formal order consolidating this case with the others.

The Attorney General for the State of Louisiana and other counsel representing the petitioning school boards in the cases arising from the United States District Court for the Western District of Louisiana, has prepared and filed a petition for Writ of Certiorari in those cases as are counsel for the Alabama school boards. In the interest of costs and time, under authority of Rules 23(5) and 15(3) and after telephone conference with the Clerk of this Court, counsel in all of the Louisiana cases, including the instant case, have

filed a consolidated record, filed with that petition. That petition also contains certain exhibits which are also applicable to this case. The record of this case will be found in Volume VII of the consolidated record filed with the joint petition filed on behalf of the other Louisiana school boards.

Petitioner believes the facts in its situation to be sufficiently different, and the application of the law therefore sufficiently different, to warrant its filing a separate petition for certiorari. Consequently, references herein to the record and exhibits will be to those contained in the consolidated record and exhibits filed with the petition of the other Louisiana school boards except where noted as attached to this petition. That consolidated petition is entitled *Caddo Parish School Board, et al., Petitioners, v. United States of America, Respondents, No.* 256. For example, references to the consolidated record will appear as C R VII p..... References to the exhibits in the consolidated petition, will appear as C P exhibit A, p..... References to appendices attached to this petition will appear as Appendix IV, p.....

CITATIONS TO OPINIONS BELOW

The orders of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division are found on p. 4 through 9 and 161 through 167 of Volume VII of the Consolidated Record. The original opinion of the United States Court of Appeals for the Fifth Circuit is found at p. 17 through 173 of Volume VIII of the Consolidated Record. The opin-

ion on re-hearing is found at Pages 244 through 327 of Volume VIII of the Consolidated Record.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 29, 1966 and is contained in the consolidated record, Volume VIII, p. 174-179. Application for re-hearing was made and the same granted on February 9, 1967, C.R. Volume VIII, p. 237-239. The Court later allowed oral argument on the said re-hearing, C.R. Volume VIII, p. 240-242. On March 29, 1967 the Court issued an opinion affirming and slightly modifying the original opinion, C.R., Volume VIII, p. 244-327 and issued its judgment in accordance therewith, C.R. Volume VIII, p. 328-333.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I. Does the prohibition of the Fourteenth Amendment against State action requiring segregation now suddenly require local school boards to affirmatively place certain students in certain schools on some percentage basis with race as the sole criteria for the selection of these students?

A. This Court has never said so and by implication has said it does not.

B. Most of the other Circuits have said it does not.

C. The Court below has heretofore said it does not.

II. Can any Court establish constitutional standards which apply to only some areas of our nation?

A. Can an Appellate Court assume the existence of certain facts (in this case the causes of residential segregation) without any evidence in the record as to such facts and where no evidentiary hearing has been held thereon at the District Court level?

III. Should the Appellate Courts hand down formalized, detailed decrees governing the operation of a local school system or should not this be left to the discretion of the trial court?

A. Does not good faith action and progress in this field by this school board justify a different order or decree from some school board which has refused to move forward?

B. Since public education is historically a local matter and since desegregation may drastically affect any school system, should not local school boards be left as free as possible, unfettered by detailed, stereotyped decrees, to experiment as much as possible in this very sensitive area?

C. The provisions of the decree ordered by the Court below are unconstitutional and/or unnecessarily burdensome and should be vacated.

D. This school board should not be bound by the decree ordered by the Court below without having been formally consolidated with the other cases before the Court.

IV. Does the prohibition of the Fourteenth Amendment, as heretofore enunciated by this Court, justify or

require the massive and virtually immediate social change sought by the opinion of the Court below when such massive and immediate social change may result in a far more inadequate *public* education system than now exists?

A. Is this not particularly true when neither the Courts nor professional educators will have any control over such deterioration and the persons whose educational opportunities are here sought to be improved will actually suffer the most?

V. Even if it is educationally desirable to require a deliberate mixing of the races, religions and nationalities in each school, is this not a matter for Congressional action and not judicial decree?

A. It is doubtful if Congress has constitutional authority to so legislate, but even if Congress has such power, it has deliberately refused to enact such legislation and has specifically prohibited same.

VI. May the Court below assume that the Fourteenth Amendment requires faculty desegregation when the only cases dealing with this subject which have reached this Court have been remanded for an evidentiary hearing thereon, which hearings have never been had?

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

Amendment XIV, Section 1 of the Constitution of the United States.

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS: EQUAL PROTECTION

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Inferentially, the Civil Rights Act of 1964 is closely interwoven, therefore, the pertinent provisions thereof will be found printed in Exhibit G of the Consolidated Petition.

STATEMENT OF THE CASE

Petitioner is one of sixty-six separate school boards in the State of Louisiana. It has the responsibility of providing and operating an educational system for all the children residing in the Parish (County) of East Baton Rouge, Louisiana. It is administered by an eleven man board elected by the people of East Baton Rouge Parish. This board appoints a superintendent and other professional educators who are charged with the responsibility of administering the system in accordance with policies adopted by the board.

At the time this suit was originally instituted, almost all southern states were in the process of legally challenging the decision in the first Brown case. These

challenges continued throughout the south until this Court made it abundantly clear that the Brown decision would not be overturned or reversed. During this time, the State of Louisiana, as did many other southern states, adopted various maneuvers in an attempt to circumvent the Brown decision. These maneuvers by state legislatures continued through the early 1960's. With respect to Louisiana, most of this maneuvering by the Louisiana Legislature was affirmatively stopped by the decision of this Court in the cases generally entitled *Bush v. Orleans Parish School Board*, 308 F.2d 491.

However, the legislation adopted during this period, being binding upon local school boards until declared unconstitutional, effectively prevented school boards throughout the State of Louisiana from taking any affirmative steps toward compliance with the Fourteenth Amendment as set forth in the Brown decision. For example, in 1960, the Louisiana Legislature, in order to insure that the East Baton Rouge Parish School Board would take no affirmative action toward desegregation, adopted legislation increasing the size of the school board from 7 to 11 members and provided for the additional four members to be appointed by the governor. The then Governor of Louisiana appointed four members to the board for the express purpose of constituting a majority which would prevent the other members of the board (the previous majority on the 7 man board) from taking any affirmative action toward compliance with the Brown decision.

On May 25, 1960 an order was entered by the District Court enjoining the School Board from maintaining a segregated school system and ordering it to make necessary arrangements for the admission of all children to schools under its jurisdiction without regard to race. Again, because of legislative mandate, this decision was appealed and was affirmed by this Court in 1961 in *East Baton Rouge Parish School Board v. Davis*, 289 F. 2d 380 (5th Circuit, 1961), cert. denied 368 U.S. 831. Immediately thereafter, on January 22, 1962, plaintiffs filed a motion for further relief. However, the East Baton Rouge Parish School Board was still in the position of having a negative majority because of the previous "packing" of the board by the then state administration.

At this point, a group of business men, attorneys, and civic leaders filed a brief amicus curiae with the Federal District Court pointing out that the 4 appointed members to the board were required to stand for election at the end of that year. Appendix III, 69. They requested the Court to delay hearing on the motion for further relief until the people, white and Negro alike, had a chance to vote on these 4 appointed members thereby giving some direction to the other also elected members of the board. The United States District Court, very wisely, deferred to the request of this group and postponed any further hearings until after the fall elections. Petitioner gained additional support when a group of local businessmen, in 1962 and again in 1963, published a statement of principles in the local newspaper. Appendix IV, p. 75, Appendix V, p.

77. Of course, the board also received the opposite type pressure and is still receiving such opposition today. See Appendix VIII p. 89 & 90.

At the 1962 fall elections, one of the four appointed members chose not to stand for re-election. The other three appointed members of the "packed" board were defeated and the new board members took office at the last meeting of the board in December of that year. At that point, the East Baton Rouge Parish School Board was composed of 11 members, each a responsible citizen of his community having been elected by a citizenry that had indicated by the previous defeat of the appointed members to the "packed" board that their community was ready for the board to begin taking steps looking toward the administration of the East Baton Rouge Parish School system in a manner which would comply with the Fourteenth Amendment and the Brown decision.

The newly elected board immediately advised its staff to commence a study to determine the most practical, economical and orderly system under which this particular school system could comply with the Brown decision. The United States District Court also immediately assigned the motion for further relief for hearing, again wisely utilizing his discretion in giving this board sufficient time to come to the Court with a plan of its own rather than having the Court establish its own plan. His obvious reason for preferring the board to devise its own plan was that the only agency with the knowledge and experience to devise the best and most proper plan for this particular

school system were the people charged with its administration, the local school board and its staff.

Thereafter, the board and its staff, after studying plans utilized by various other school districts throughout the south, composed a plan consisting of parts of the plans then being utilized by school districts in other states plus some ideas of its own. This was necessary because some portions of some of the plans being utilized in other school districts in other states would not fit our own local school system, would have created new and most difficult administrative problems, and could have resulted in less elimination of discrimination rather than more elimination of discrimination.

This was not an easy task for this school board and its staff, as I am sure it was not an easy task for any school board or staff, no matter where located. For example, the board had a great deal of difficulty in determining which year, or at what grade, to commence desegregation. There was a great deal of discussion on the very pertinent point of at what age level could the children in the schools, both Negro and white, make this transition with the least damage to the students themselves, particularly the Negro children. Some board members felt the transition could better be made at the 12th grade level, some at the 1st grade level, and some even at the 5th and 6th grade level. However, as is true of all legislative bodies, reasonable men, sincerely trying to solve a difficult problem in the best interest of the students under their care and guidance, made their own beliefs secondary to the primary objective of moving forward and the majority

of the board finally decided on commencing at the 12th grade in accordance with the Atlanta plan as approved in *Calhoun v. Latimer*, 321 F. 2d, 302, (5th Circuit, 1963.), a plan having rather rigid transfer procedures and containing certain criteria for refusal of transfer requests. C.R. VII p. 6, 7, & 8.

On July 18, 1963 the United States District Court, after conferences with counsel for both plaintiffs and defendants, approved the plan submitted by the board with certain modifications imposed by the Court. C.R. VII p. 4-9. The board immediately put the plan in operation for the school year scheduled to commence in only approximately 60 days and operated under this plan until April 19, 1965 when counsel for plaintiff filed two motions; a motion for further relief and a motion to add additional parties defendant. At this point the plan had proceeded downward to include the 12th, 11th and 10th grades.

Between 1963 and 1965, as will appear from the deposition and testimony of Mr. Robert J. Aertker, Superintendent of Schools for East Baton Rouge Parish, C.R. VII p. 116 and 198, meetings were held with both principals and teachers to outline their responsibilities in accepting the Negro children into their schools without trouble. Notices were sent out in accordance with the plan. In the first year of operation under the original 1963 order and plan, the 1963-64 school year, 38 negro students applied for admission to 4 previously white schools with 27 being admitted. The following year, 1964-65, 107 negro students applied

and 61 were admitted to 4 previously white schools. Appendix II p. 65.

On the motion for further relief, the District Court again properly requested the Board to present a plan more in line with the latest announcements of the circuit courts, particularly the 5th Circuit. The hearing on the motion for further relief was had on June 2, 1965 at which time the case of *Lockett v. Board of Education of Muscogee County*, 342 F. 2d 225 (5th Circuit, 1965) was the last pronouncement of the Fifth Circuit and the district court required the board's plan to meet the minimum requirements as set forth in that case. These minimum requirements provided for the elimination of discrimination by grade in an upward progression from the first grade as well as a downward progression from the twelfth, at least two grades a year, and required that all grades be desegregated by the school year of 1968-69. The only deviations from the Lockett minimums which the District Court allowed were to permit the elimination of discrimination in the Junior High School grades, 7th, 8th and 9th, at the end, the school year commencing September 1968, for the reason that those grades are the most crowded grades in all schools and the school board was then, and is now, under a massive program to eliminate these crowded conditions at the junior high level. The other deviation was with respect to permitting students coming into the East Baton Rouge Parish School system for the first time at a grade level not yet desegregated to be treated as though that grade level were desegregated for that child alone. The

court felt that this would give particular children from out of the system greater rights than would have the other children in our own system which he did not feel was proper.

The Board readily followed the District Court's instructions and presented a modification of its existing plan in accordance with the Lockett requirements and this plan was approved by the District Court on July 15, 1965. The new 1965 plan eliminated the rigid transfer procedures and eliminated all criteria previously used for denying transfers. The school system then commenced operating under a pure freedom of choice system. Although we have now operated two years under this system, such operation is not reflected in the record as it was from this order of the District Court that plaintiffs prosecuted the present appeal. The following year, the 1965-66 school year, 158 negro students applied for admission to 11 previously all white schools and all of them entered the school of their choice. The following year, the 1966-67 school year, 226 negro students applied for admission to 10 previously all white schools and all attended the school of their choice. Appendix II p. 66 and 67. The Board has just completed its spring pre-registration for the upcoming 1967-68 school year and due to the desegregation of five (5) additional grades (5th, 6th, 7th, 8th and 9th) next year, it appears that we will have 1611 negro students who have chosen, and will attend 37 previously all white schools next year. Of this total, 1298 are new registrants and 776 of those are from the (5) additional grades desegregated this year. We will

also have 12 white students entering two previously all Negro schools.

Furthermore, during the two year period from 1965 to date other good faith steps were taken by the Board toward compliance with Brown which were not required by the District Court order and which are not reflected in the record. All teacher and principal meetings were desegregated and all in-service training programs were desegregated. In addition, the Board commenced construction of an addition to the School Board office building in order to bring all negro supervisory and Staff personnel into the School Board office on a desegregated basis. This building is almost complete and is expected to be in operation on a desegregated basis by September of this year. Additional faculty desegregation will also occur this year.

REASONS FOR GRANTING THE WRIT

I.

A.

The decision of the Court below in the instant case, if not in direct conflict with the existing opinions of this Court, go so far beyond any previous decision of this Court that they require review by this Court to determine if they actually conflict with Constitutional principles previously stated by this Court.

The Court below says that "The only school desegregation plan that meets constitutional standards is *one that works.*" (emphasis added) *U.S. et al v. Jeff. County Bd. of Educ., et al*—Fed. 2nd—at page 7. CP

Exhibit L. Jefferson I, p. 7. Although the Court then fails to say explicitly what it means by "one that works", its references to the Civil Rights Act and HEW guidelines can lead to only one conclusion. Although it says the percentage requirements of the present HEW Guidelines are "general rules of thumb", *Jefferson* I, *supra, p. 95*, failure to meet these, and unknown future HEW requirements obviously implies a violation of the Constitution.

The 1966-67 HEW Guidelines refer to a percentage of desegregation of 15 to 20 percent for this School Board for the 1967-68 school year. CP Exhibit I p. 146 & 147. What will be the percentage figure for the 1968-69 school year? If we went to a pure geographic single zone system and still did not meet the percentage requirements of HEW, what then? Or, suppose that with a pure geographic single zone system we *did* meet the HEW requirements next year, but, because of people moving out of the zones, we fell below the percentages the next year, what then? The only answer to "one that works", must, obviously, according to the Court below, be the maintenance, by direct and forced assignment based solely on race, of a certain percentage of each race in each school. The entire Court, on rehearing, re-affirms this duty to balance the races in the schools when it says:

> "The Court holds that boards and officials administering public schools in this circuit[1] have the *affirmative duty* under the Fourteenth Amendment to bring about an *integrated*, unitary school system in which there are no Negro schools and

no white schools—just schools. *Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize.* In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit *requires integration of faculties, facilities, and activities, as well as students.* To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled." (Emphasis added) CP Exhibit L, Jefferson II, p. 5.

Yet, this Court has consistently held that the Fourteenth Amendment *only* prohibits the *states, state agencies and state officials, by legislation or administrative action,* from denying to any citizen, because of his race, any of the rights and privileges guaranteed by the Constitution and enjoyed by other citizens. In so doing this Court has held *state* discrimination because of race, (the denial of rights enjoyed by other citizens merely because of race), invalid in cases involving public playgrounds, *Watson v. City of Memphis,* 373 U.S. 526, 83 S.Ct. 1314 (1963); trespass convictions, where local segregation ordinances preempt private choice, *Peterson v. City of Greenville,* 373 U.S. 244, 83 S.Ct. 1119 (1963); seating in courtrooms, *Johnson v. Virginia,* 373 U.S. 61, 83 S.Ct. 1053 (1963); restaurants in public buildings, *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 2d 45 (1961); bus terminals, *Boyn-*

ton v. Com. of Virginia, 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed. 2d 206 (1960); railroad dining-car facilities, *Henderson v. United States*, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302 (1950); state enforcement of restrictive covenants based on race, *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); labor unions acting as statutory representatives of a craft, *Steele v. Louisville & Nashville R. Co.* 323 U.S. 192, 65 S.Ct. 226, voting, *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); and juries, *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879).

With regard to public schools, this Court, in interpreting the Fourteenth Amendment, has only said "Such an *opportunity*, (opportunity of an education) where the state has undertaken to provide it, is a right which must be made *available to all on equal terms*". (Emphasis added) *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. This language is the test of the Fourteenth Amendment—"available to all on equal terms". To say, as does the Court below, that to make all schools available to all students on the same basis is unconstitutional, is to ignore the history of, and judicial pronouncements of this Court on, the Fourteenth Amendment. It completely ignores the plain and explicit language of *Brown*, supra. In fact, Justice Clark in *Goss v. Board of Education of City of Knoxville, Tennessee*, 373 U.S. 686, 83 S.Ct., 1405, at p. 1408, in declaring invalid a "transfer out" provision, refers to trespass convictions which have been overturned "where local segregation ordinances

preempt private choice," (Emphasis added), *Peterson v. City of Greenville*, 373, U.S. 244, 83 S.Ct. 1119 (1963).

A further indication of the requirements of the Fourteenth Amendment are found in Justice Clark's comments at p. 1408 wherein he says:

> "Our task then is to decide whether these transfer provisions are likewise unconstitutional. In doing so, we note that if the transfer provisions were made available *to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case.* Pupils could then, at their option, (or that of their parents) *choose*, entirely free of any imposed racial considerations to remain in the school of their zone or to transfer to another. . . ." (Emphasis added)

There is other language to the same effect.

Cooper v. Arron, 358 U.S. 1, 78 S.Ct. 1401, is a further strong indication of the meaning of the Fourteenth Amendment as it applies to public education. Cooper was deemed so important by the Court at that time that *the opinion was issued under the names of each and every Justice of the entire court.* Justice Frankfurter felt it to be so important that he issued an additional concurring opinion. This Court thoroughly reviewed the history of school desegregation and its pronouncements thereon and then, quoting Brown, said at page 1403:

> "On May 17, 1954 this Court decided that

enforced racial segregation in the public schools of a state is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686." (Emphasis added)

Again on Page 1404, the entire Court quoted with approval the language of Brown saying:

". . . To that end, the Courts may consider problems related to administration arising from the physical condition of the school plan, the school transportation system, personnel, revision of school districts and attendance areas into compact units to *achieve a system of determining admission to the public schools on a non-racial basis*, and revision of local laws and regulations which may be necessary in solving the foregoing problems . . ." (Emphasis added)

Petitioner respectfully submits, that this school board has "achieved a system", through a freedom of choice plan, of "determining admission to the public schools on a non-racial basis". Again, on p. 1409 the entire Court says:

"The controlling legal principals are plain. The command by the Fourteenth Amendment is that *no 'state' shall deny* to any person within its jurisdiction the *equal protection* of the laws . . . the Constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the *equal protection* of the laws . . ." (Emphasis added)

To get the true meaning of *Brown* and other

interpretations of the Fourteenth Amendment by this Court, we also may look to further language of Justice Frankfurter in his concurring opinion in *Cooper*. On p. 1413 he says:

> "The process of ending *unconstitutional exclusion of pupils* from the common school system —*'common' meaning shared alike*—solely because of color is no doubt not an easy, overnight task in a few states where a drastic alteration in the ways of communities is involved." (Emphasis added)

Furthermore, in two cases in which the holding of the Circuit Court was directly contrary to the decision of the Court below, this Court has refused to reverse such holding. In *Bell v. School City of Gary*, (7 Cir.) 1963, 324 F.2nd 209, Cert. den. 377 U.S. 924, 84 S.Ct. 1223, the 7th Circuit said:

> "We agree with the argument of the defendants stated as 'There is no affirmative U.S. constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either negro or white pupils' ".

The Bell Court further quoted with approval *Briggs v. Elliott*, 132 F. Supp. 776 and the statement therein at p. 777:

> "The Constitution, in other words, does not require integration. It merely forbids discrimination."

If these were not correct statements of the law, this Court could have said so at that time. Instead, you

denied certiorari. 377 U.S. 924 Again, in the case of *Bradley v. School Board of City of Richmond*, 345 F.2d 310 (1965), reversed on other grounds 382 U.S. 103, this court had a further opportunity to consider this question. The Bradley case upheld a freedom of choice plan. The Bradley Court said

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination . . ."

The Bradley Court further said:

> "As we clearly stated in *Jeffers v. Whitley*, 309 F.2d 621, 629, (Fourth Circuit, 1962), the Appellants are *not* entitled to an order *requiring the defendants to affect a general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil because of the pupils' race . . ."

In the Bradley case, this Court granted certiorari and after consideration reversed on other grounds, 382 U.S. 103. If Bradley's statements of the law, as quoted above, were incorrect, this Court could have said so at that time.

The opinion of the Court below, in requiring an *affirmative* duty to "integrate" or "correct racial imbalance" or "balance the races", goes so far beyond the Constitutional *prohibition* and the prior language of this Court in all its decisions, as to be in actual, if not direct, conflict with the decisions of this Court.

B.

In addition to going far beyond all existing decisions of this Court, the decision of the Court below is in conflict with decisions of the Courts of Appeals of the First Circuit (*Springfield School Committee v. Barksdale*, 348 F.2d 261 (1965); the Third Circuit (*Evans v. Ennis* 281 F.2d 385, 1960); the Fourth Circuit (*Swann v. Charlotte—Mecklenburg Board of Education* 369 F.2d 29, 1966, *Jeffers v. Whitley, infra*, and *Bradley v. School Bd. of Richmond, infra*) the Sixth Circuit (*Deal v. Cincinnati Board of Education* 369 F.2d 55, 1966) the Seventh Circuit (*Bell v. School City of Gary, Indiana* 324 F.2d 209 (1963) cert. denied 377 U.S. 924, 1965) the Eighth Circuit (*Clark v. Board of Education of Little Rock* 369 F.2d 661, 1966, Re-hearing denied—1967).

All of these cases consistently follow the doctrine set forth in *Briggs v. Elliott*, 132 F.Supp. 776, wherein the Court said:

> "The Constitution, in other words, does not require integration. It merely forbids discrimination."

For example, in Deal, supra, the Court said:

> "Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or *result from private, not school, prejudice. We read Brown as prohibiting only enforced segregation. . . .*
>
> We hold that there is *no constitutional duty*

on the part of the Board to bus Negro or white children out of their neighborhood or to transfer classes for the *sole purpose of alleviating racial imbalance* that it did not cause, nor is there a like duty to select school sites solely in furtherance of such a purpose." Emphasis added)

Or, as was said in *Swann, supra:*

"... Whatever the Board may do in response to its own initiative or that of the community, *we have held that there is no Constitutional requirement* that it act with the conscious purpose of achieving the maximum mixture of races in the school population. ..."

The recent decision of the Eighth Circuit in *Clark, supra,* in which a re-hearing was denied in April of this year, still reaches this conclusion when the Court said:

"Though the Board has a positive duty to initiate a plan of desegregation, *the constitutionality of that plan does not necessarily depend upon favorable statistics indicating integration of the races.* The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the School Board, it cannot be said that the State is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students the free choice of schools. ..." (Emphasis added)

C.

Furthermore, the Court below, in one fell swoop, specifically overruled ten of its own decisions, none over ten years old and three rendered less than four years ago. *Avery v. Wichita Falls Independent School District*, 1956, 241 F.2d 230; *Borders v. Rippy*, 1957, 247 F.2d 268; *Rippy v. Borders*, 1957, 257 F.2d 73; *Cohen v. Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery v. Gilmore*, 1960, 277 F.2d 364; *Boson v. Rippy*, 1960, 285 F.2d 43; *Stell v. Savannah-Chatham County Board of Education*, 1964, 333 F.2d 55; *Evers v. Jackson*, 1964, 328 F.2d 408; *Lockett v. Board of Education of Muscogee County*, 1965, 342 F.2d 225. *Jefferson II*, page 6, footnote 3, CP Exhibit L p. 6. **Does the meaning of our Constitution really change that drastically, that fast?** Or, is the Court below attempting to make the Constitution what Justice Frankfurter, in his concurring opinion in *Cooper*, says it is not when he said at page 1413:

> "The Constitution is not the formulation of the merely personal views of this Court . . ."

And is not the court below justly subject to the criticism expressed by Judge Cox in his dissenting opinion to *Jefferson I*, C.P. Exhibit L, Jefferson I, p. 150, when he said:

> ". . . This Court cannot . . . become impatient as trail-blazers and rewrite the decisional law of this Circuit as my good friends have undertaken to do in this case . . ."

Or the criticism expressed by Judge Hutchinson in

Denzel Milton Lee v. United States of America, 322 F.2d 770 (C.A. 5-1963) when he said:

> ". . . I emphatically condemn and reject the majority view as simply personal decreeing and, as such, alien to this Circuit and to the law generally and as completely unauthorized. . . ."

We respectfully submit that it is not the duty or the right of any Court to impose its own ideas of what is educationally or socially best on our many local communities. This is, at best, a function of Congress.

II.

A.

The Court below, apparently out of a belief that the South should be punished by being treated differently than any other area of the nation, and in an attempt to avoid the very clear holding of the 7th Circuit in *Bell v. School City of Gary*, 324 Fd. 2d 209, Cert. denied 377 U.S. 924 (1965), that segregation in schools resulting from residential housing patterns was not state enforced segregation and did not violate the Fourteenth Amendment, has twisted the very plain and explicit definition of "desegregation" contained in Section 401 (b) of Title 4 of the Civil Rights Act of 1964, an act of national application, so as to make it applicable only in the South.

Discrimination of such a punitive nature would be bad enough if imposed by Congressional action as was done immediately after the Civil War. Here, however, the court below makes it even worse by imposing it as minimum constitutional standards.

The Fourteenth Amendment itself provides that

all citizens, whether north, south, east or west, shall be treated alike. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. . ." Amendment Fourteen, Section I of the Constitution of the United States. Our Constitution should apply equally to all citizens in every section of our nation.

On the other hand, if the Court below is saying that the Constitution applies equally to everyone, everwhere, but that it has a different effect on different facts, the Court has assumed the existence of certain facts without any evidence whatsoever in the records of these cases to justify such assumption. Furthermore, to our knowledge there has never been an evidentiary hearing held on the question of what caused the racial makeup of residential housing patterns in any community of any state in our nation. The Court below has apparently assumed that where negroes and whites live in the same neighborhood in the North they have done so because they wanted to and conversely where they live in separate segregated neighborhoods in the North, they have also done so because they wanted to. Yet, for the South, the Court apparently assumes that where negroes and whites live in separate neighborhoods, it is not because they wanted to but because they were required to by law. What of the neighborhoods in the South where whites and negroes live together (and there are many) is that also the result of segregation laws? Again, not only was there not one iota of evidence in the record to justify such

conclusion, such proposition was not even mentioned, much less argued, by either plaintiffs or the government in brief or oral argument in any of these cases prior to the decision in Jefferson I.

Furthermore, the Court attempts to read into the very explicit definition of "desegregation" in the Civil Rights Act the distinction the Court wants to find by quoting comments of four Congressmen in hearings before Congress. This assumes (1) that these four Congressmen understood their comments as the Court insists on understanding them, (2) that the rest of the members of Congress also understood the comments of these four Congressmen as the Courts insists on understanding them, (3) that these four Congressmen had thoroughly read and thoroughly understood the Bell case and understood Bell to draw a distinction between "de jure segregation" and "de facto segregation" and (4) that the rest of the members of Congress had also thoroughly read and thoroughly understood the holding in Bell and understood the comments of these four Congressmen as the Court insists on doing.

However, even the statements of Senator Humphrey, quoted by the Court below, do not support the Court's position. On Page 81 of Jefferson the Court below quotes Senator Humphrey as follows:

> "*The bill does not attempt to integrate the schools*, but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students will have to travel are considered legitimate means to

determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. *The fact that there is a racial imbalance per se is not something which is unconstitutional.* That is why we have attempted to clarify it with the language of Section IV." (Emphasis added)

We respectfully submit that the Court assumes too much from the isolated comments of these four Congressmen.

III.

A.

The formal decree handed down by the Court is so detailed, formalized and specific that it completely usurps the discretionary powers of the trial court. This is directly contrary to the statements of this Court in the second Brown decision which recognized that the District Court, being closer to and more knowledgeable of local situations was the proper Court to fashion orders and decrees in these matters. As soon as the application for stay order to this Court was refused, all of the District Courts in Louisiana felt legally bound to implement, word for word, the decree handed down by the Court below. Only the District Court for the Eastern District of Louisiana, Baton Rouge Division, felt that it had sufficient latitude so as to not hand down the detailed, specific, word for word, decree to all of the School Boards in his jurisdiction. However, since the East Baton Rouge Parish School Board had apparently, by some ad hoc method, been consolidated with the other cases in-

volved in Jefferson, he did feel obligated to hand us the Fifth Circuit decree although he indicated in the opinion issued therewith that he objected strongly to this case being taken out of his supervisory jurisdiction. Appendix I, p. 62.

Furthermore, the Court below, while in the very act of handing down a very specific, detailed decree, which has many burdensome and unnecessary provisions, at the same time appears to recognize its lack of competency to do that very thing when it says "School desegregation plans are often woefully inadequate; they rarely provide necessary detailed instructions and specific answers to the administrative problems. *And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers.*" CP Exhibit L Jefferson I, p. 24. This lack of competence is evident from the decree itself which imposes financial burdens in requiring a multiplicity of reports and a multiplicity of forms all of which are unnecessary, the upgrading of and/or closing of certain schools, limitations on the construction of schools, apparent or possible limitation on transfer of athletes to curtail proselyting of athletes, etc. This lack of knowledge is a problem for a District Court judge who hears the testimony and sees the evidence. It is an impossibility for an Appellate Court who is reading only a dry record which, as in this case, was a year and one-half old at the time the Appellate Court had it under consideration.

We respectfully submit that these cases should be returned to the supervisory discretion of the District Courts who at least have some familiarity with the school systems under their jurisdiction and have the testimony and the evidence freshly before them from day to day.

B.

Another aspect of this matter which we feel is important and should be considered by this Court is whether or not a school board which has demonstrated good faith progress in attempting to comply with the mandate of this Court as set forth in Brown and subsequent decisions should be penalized by so sweeping a decision, so detailed a decree, because some other school board in some other community, and even in some other state, can not demonstrate good faith compliance.

Because of legislative mandate, including "packing of the board" from 1960 through the end of 1962, this particular school board was hampered, if not completely prohibited, from taking any real affirmative steps in compliance with the Brown case and other decisions until 1963. However, as is shown by the record, immediately after the "unpacking" of the board, the new board, in good faith, took immediate affirmative steps to eliminate discrimination in its school system by presenting the court with a plan of desegregation which, at that time, met the standards of all existing Federal Court decisions. During the operation of the system under that plan, it handled each incident

or problem that arose in an affirmative manner looking toward full compliance, in spirit, as well as the letter of the court approved plan. When incidents arose between Negro and white students, these incidents were handled just as they had been handled for years. If it were possible to effectively determine the guilty student, that student only was punished. In cases where it was difficult to determine which student was actually at fault, it was handled just as with any other students, both of the students involved were disciplined.

When the question arose as to whether the Negro students would be permitted to play basketball together with the white students during physical education classes, the principals were advised that they would be permitted to do so and would be treated just as any other student.

When the question arose as to whether a Negro student would be allowed to become a member of and participate in the band at a previously all white school, the principal was advised that the student could do so just as any other student.

When the question arose as to whether, at senior high school graduation exercises, the Negro students would be seated together in one group on the stage, a meeting was held with the principals for a complete and candid discussion of this problem. The result of that meeting was that the principals were instructed to seat the students in alphabetical order without regard to race or color. As a matter of fact, the principals themselves felt that this was the best way to

handle the situation, regardless of objections from parents of some of the white students.

At this point, the plan for East Baton Rouge Parish seemed to be working smoothly and accomplishing the desired purpose. The great majority of Negro parents, as well as white parents, and also students, appeared to be satisfied with the progress of the plan.

When counsel for plaintiffs filed their second motion for further relief in 1965, the Board, although it contended that our plan was adequate and working satisfactorily, quickly presented a modified plan meeting the standards indicated by the court. Under that plan, all grades of the East Baton Rouge Parish School system would have been desegregated by the school year commencing September, 1968. All students, regardless of race, are permitted to attend the school of their choice within certain boundary limitations. These boundaries are established because of administrative and economic considerations and apply equally to all children living within that district. Each district contains at least two schools which any child in that district may attend. The children are notified in the spring of each year, primarily through their principals and teachers, that they may attend either of two specific schools during the next year if they so desire.

All assignment of students to buses because of race has been eliminated regardless of what counsel for plaintiffs may allege in their brief. Bus transportation is one of the more costly items of the school

board budget. Each year, the East Baton Rouge Parish School Board spends approximately $1,125,000.00 on bus transportation. Due to this cost, buses are assigned routes which serve particular neighborhoods and particular schools in order to keep the routes traveled by a bus as compact as possible in order to cut operating costs.

Furthermore, the board and staff, are recognizing their responsibilities under the mandate of the court and gradually, with experience, are obtaining a better idea of how to handle and solve the many complex administrative problems involved in this transition. An indication of this progress, given time and experience, is that the staff discontinued holding separate meetings for the white and Negro teachers and staff and have almost completed construction of an addition to the School Board office building for the purpose of moving all of the Negro supervisory personnel into the School Board office with the white supervisory personnel thereby eliminating discrimination in that area. We believe it important to note that the desegregation of teacher and staff meetings and the bringing of Negro supervisory personnel into the main School Board office on a non-segregated basis has been done voluntarily and without any admonition by the Court.

In addition, all signs for rest rooms etc. delineating a distinction between Negro and white have been eliminated. Furthermore, any designation or distinction or use of the term white and Negro has been eliminated from all forms, applications, reports etc. Commencing with September of this year all grades will

be desegregated and all Negro or white districts eliminated. All districts are now designated merely as school attendance districts. All committees appointed to study school problems contain both Negro and white personnel.

The good faith and cooperation of this particular School Board has been repeatedly recognized by the District Court having jurisdiction. Two years ago, in 1965, on the hearing of the motion for further relief which resulted in this appeal, District Judge West said:

> "All right, gentlemen, I see no reason to delay, except in the details involved in this case, what the order of this Court will be. Some details will have to be left to the School Board to work out, because as I have stated on numerous occasions, I don't propose to administer the school system of this parish. I think we have duly elected officials who are highly competent to do so, and I might add now, as I said a while ago and I have said in previous decisions, that the school board of this parish has been the most cooperative school board of any that I know, not only with this Court but with the colored people who have had any dealings with them, and they have abided by the Court's orders; and this is one of the very few places in the United States where the parish school system was desegregated without so much as a single picket appearing on the sidewalk in an area that foretold of all kinds of violence before it came about, and it was done peacefully, it was done in a gentlemanly manner by everybody concerned and I have commended them be-

fore and I commend them again. . . ." (C.R. VII, p. 242.)

Since then, as pointed out above, this particular Board has taken additional good faith steps that were not required by the Ditrict Court. All of this has been done in spite of phone calls, letters, cross burnings and other harassments of the class shown by Appendix VIII, p. 90. Are we now to be penalized by this sweeping decision and detailed decree in spite of the good faith cooperation and progress of this Board and its staff? If this is to be the reward for cooperation and good faith progress why should any school board anywhere cooperate or act in good faith? We are now, because of the decision and decree of the Court below, in no better position than the most recalcitrant school board.

C.

Since public education is a local matter and since Congress has not legislated with respect thereto, some provisions of the decree would seem to be completely beyond the power of a court under our system of government which provides for a separation of powers between the executive, judicial and legislative branches. Section VII of the decree of the Court below entitled "New Construction," CP Exhibit L, Jefferson II, p. 18, impliedly tells local school boards where they can and cannot build schools. If the opinion and decree of the Court below is allowed to stand, it is conceivable that some Court in the future will enjoin this School Board from utilizing a school or schools which are now in the planning stages as the construction of same may

have been prohibited by this decree. Section V of the decree, CP Exhibit L, Jefferson II, p. 16, regarding athletic programs, may open the doors of our schools to wide open proselyting of athletes even though high school and college athletic associations, both state and national, have been fighting this for years. The mailing of choice forms required by Section II of the decree, CP Exhibit L, Jefferson II, p. 8, is unnecessarily burdensome, both financially and physically and totally unnecessary. The requirement that a child make an affirmative choice each and every year rather than only when entering schools or changing from elementary to junior high or junior high to senior high is also unnecessary since every child *has the right* to change his choice at the beginning of any year. The report requirements of Section IX and elsewhere of the decree, CP Exhibit L, Jefferson II, p. 17, 19 & 20, are obviously designed to permit the plaintiffs, the NAACP, the Justice Department, and the Department of Health, Education and Welfare to police the administration of these local school systems. Requiring such reports is burdensome, unnecessary, and contrary to the historical concept of local control of public education.

D.

Even if this decree is allowed to stand in some form so as to specifically, directly and immediately affect the school boards whose cases were orally argued on the same day before the Court below, this School Board should not be bound by the decree of the Court below because it has never been properly consolidated with the other cases before the Court below. The United

States District Court for the Eastern division of Louisiana, Baton Rouge Division, should be left free to fashion, for this School Board, what it feels is necessary and proper after a full hearing thereon at the trial court level.

IV

A.

Heretofore, the courts in these cases have been dealing with the desegregation of school systems as operated by elected state and local officials over whom the courts had some control. The courts have been primarily dealing with people dedicated to preserving public education; superintendents, staff personnel, school board members, who would not suffer what they must with little or no pay, unless they were dedicated to public education. If, however, the opinion of the Court below is allowed to stand, requiring its ultimate forced integration or forced mixing of the races on some percentage basis, the Court will no longer be dealing with state and local officials or even dedicated public educators. The problem then will be with private individual citizens, some who care more, *some who could care less*, about public education. You will be dealing with their individual prides and prejudices and their resulting individual private discrimination. This, unfortunately may very well apply to teachers as well as to individual parents and students.

The opinion of the Court below touches briefly on this facet of the problem on pages 10 and 11 of the opinion, CP Exhibit L Jefferson I. p. 10 & 11, but then blithely moves on without further consideration

as though mere mention of the problem affords a solution. The Court below at page 10 says:

> "We approach decision making here with humility. *Many intelligent men of good will who have dedicated their lives to public education* are deeply concerned for fear that a *doctrinaire approach* to desegregating schools *may lower educational standards or even destroy public schools in some areas.* . . . The court is aware of the gravity of their problem. (1) Some *determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children.* These men flee to the suburbs, reinforcing urban neighborhood school patterns. (2) Private schools, aided by state grants, have mushroomed in some states in this circuit. *The flight of white children to these new schools and to established private and parochial schools promotes resegregation.* (3) *Many white teachers prefer not to teach in Negro schools. They are tempted to seek employment at white schools or to retire.* (4) Many Negro children for various reasons prefer to finish school where they started . . ." (Emphasis added)

We certainly agree that these are grave problems, but we do not agree that they should then be blithely ignored. When the court says "some determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children. . . .", I cannot help but get the impression that the Court was thinking in terms of some well-known public figures whose anti-integration statements have been well publicized or perhaps members of the Ku

Klux Klan and the like. If this is what the court had in mind it is not seeing the trees for the forest.

Once the opinion of the Court below is permitted to stand, requiring its ultimate integration and mixing of the races on some percentage basis, probably population, many parents (not members of the Ku Klux Klan, the Citizens Council or the John Birch Society, but moderate law abiding citizens), seeing their children being bussed ten or fifteen miles to a Negro neighborhood and a predominately Negro school, will, very likely, allow their personal prejudices to come into play. They are likely to practice that private discrimination which the Constitution and *Brown* can not touch by taking their children out of the public schools and placing them in legitimate, established private or parochial schools. Of course, this will be expensive, perhaps too expensive for any but those of the middle income or higher group. If that group does, over the period of the next three to five years, take its children from our public school system, they will soon lose interest in voting taxes for financial support of a public education system which they are not using.

Many of our teachers, who may be financially independent because their husbands are employed, may refuse to go into Negro neighborhoods, at great distances from their homes, to teach in predominately Negro schools with predominately Negro faculties. They may choose to retire. With less taxes voted by the people for public education, the pay scale for public school teachers may drop far below that of private school teachers. This could also tend to discourage our

young people in college from going into the teaching profession or at least encourage them to seek employment in private, rather than public schools.

What will be the result of all this? The people who cannot afford private schools, the very ones *Brown* and the Civil Rights Act were supposedly designed to help, the Negro children, are left with an inadequately financed public education system, with inadequate facilities, inadequate equipment, inadequate supplies, and an inadequate number of even less qualified teachers. And, again, an important fact is that this will not be the result of action by public education or local public officials over whom the court can exercise some control, but the result of the private, individual prejudices of people, which, as must be obvious to everyone, have not been eradicated by all of the opinions of all the courts of this land or by all the legislative enactments of Congress.

Riots, demonstrations, violation of peace and order, destruction of private property, and repeated cries of "black power" of certain leaders of Negro organizations, constantly harden this private prejudice. In the midst of these trying times, the Court below injects a sudden and sweeping social change which was unnecessary and which will only harden private individual prejudice and crystalize private, individual opposition.

We respectfully suggest that only time and the efforts of men of good will of both races can accomplish what the Court below is trying to accomplish by judicial decree.

We further respectfully suggest that sweeping decisions such as this, to which many people strongly object, not on the basis of race, but on the basis of their violence to our Constitution, not only extend the time element, but build a wall between men of otherwise good will. We believe this to be particularly true in this case where the Court for the first time is leaving the men of good will in public education and reaching an area of private prejudice and discrimination over which it has no authority and no means of controlling.

The imposition of sweeping and sudden social change as wrought by *Jefferson* will not only not allow, but will prevent, the ultimate realization of Justice Frankfurter's statement in Cooper that:

> "By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences..."

V.

A.

Although certain officials of the United States Government, certain Congressmen, and certain educators may believe that it is educationally desirable to have persons of all races, creeds, religions, and national origins mixed in each school on some percentage basis, we respectfully submit that such proposition is not now properly before this Court.

It may be that in the future such legislation will be proposed to Congress at which time a fair hearing and debate on the merits of such proposition as to whether it is desirable, educationally, to compel a mix-

ing of the races in the schools, may be fairly heard and decided in the legislative halls of this nation. This would be a proper function of Congress, if Congress has power to legislate in such manner in this field. Only after such discussion and final passage of congressional legislation adopting such proposition, could that proposition be before this Court. Only then would this Court have before it, the very real constitutional question of whether or not Congress has authority to enact such legislation. As yet, however, Congress not only has not so spoken but has explicitly refused to so speak. *Civil Rights Act of 1964*, Section 401(b), 407. CP, Exhibit G, p. 101 & 105.

VI.

The Court below has conclusively assumed that school faculties must also be integrated by the deliberate assignment of certain teachers to certain schools with the sole criteria for such assignment being race although this Court has never held that the Fourteenth Amendment required the deliberate assignment of teachers to schools because of their race. Since 1954, there have been only five cases in which the question of faculty integration was raised and discussed by the Appellate Court. These five cases were *Bradley v. School Board*, 345 Fd. 2d 310 (4th Circuit, 1965), vacated and remanded on other grounds 86 S.Ct. 224 (1965), *Rogers v. Paul*, 345 Fd. 2d 117, (8th Circuit, 1965) vacated and remanded on other grounds, 86 S.Ct. 358 (1965), *Augustus v. Board of Public Instruction of Escambia County, Florida* 306 F. 2d 862, *Board of Public Instruction of Duval County of Florida*

v. Braxton 326 F. 2d 616, Cert. denied 377 U.S. 924 84 S.Ct. 1223 and *Calhoun v. Latimer* 321 F. 2d 302.

In *Bradley* (Fourth Circuit) and *Paul* (Eighth Circuit), the Court merely held that negro students had standing in Court to raise the question as to whether or not faculty assignments based on race violated their constitutional rights and remanded the case to the District Court for an evidentiary hearing thereon. In the *Escambia County* case, the Fifth Circuit set aside an order of the trial court dismissing allegations in the complaint seeking to put an end to the assignment of teachers and other personnel by race, holding that it was a matter of proper concern for the District Court. In the *Calhoun* case the Fifth Circuit held that the trial court did not err in postponing consideration of the teacher assignment question. That is exactly what the District Court did in the instant case. C.R. Volume VII, p. 246.

In the *Duval County* case the Fifth Circuit approved an order of the trial court prohibiting assignment of teachers by race as well as prohibiting construction which perpetuated, maintained or supported a school system operated on a racially segregated basis. This Court then denied certiorari. 377 U.S. 924, 84 S.Ct. 1223.

Except for the *Duval County* case, the Courts, including this Court, had only affirmed the standing of Negro students to raise the question of faculty desegregation and their right to an evidentiary hearing on that question. These evidentiary hearings, so for as we have been able to determine, have never

been held and the factual question of whether or not being taught by a Negro teacher is detrimental to a Negro student or violates his constitutional rights has never been determined. The dissent of Judge Jones in the *Duval County* case is particularly pertinent on this point as his dissent is based upon the original *Brown* decision of this Court. 326 F. 2d 616, 621. Only the Fifth Circuit, in only the *Duval County* case and this case, has by passed its former decisions as to these evidentiary hearings and assumed the proof of the fact without such proof having been made or such hearing having been held: Petitioner respectfully submits that there are practical as well as constitutional differences between student desegregation and faculty integration.

The question of ceasing to discriminate with respect to teacher assignment as compared to forcibly integrating the teachers in the schools is a most difficult problem. With students, a board can utilize a freedom of choice plan, a unitary school district plan, or a combination thereof, and accomplish the desired result of eliminating discrimination. However, with teachers, we are bound by our state teacher tenure law (L.R.S. 17:441, 442, 443) under which a teacher acquires tenure in her position after a probationary period of three years and an assistant principal or principal of a school also acquires tenure in a particular position after a period of probation. The existence of this law, some 20 odd years old, complicates an already complicated problem.

Even if you attempt to accomplish teacher de-

segregation purely on the choice of the teachers, how do you justify giving a Negro teacher a position in a particular school being occupied by a white teacher who is perfectly happy in that particular job and who is doing an excellent job in that position. Conversely, how would you justify putting a white teacher into a school and position presently held by a Negro teacher who does not want to be transferred. Such procedure is additionally intolerable if neither teacher wants to be transferred.

Furthermore, is it constitutionally necessary for Negro children to have a white teacher when they don't want a white teacher and are happy with the teacher they presently have? The converse would also be constitutionally questionable. However, the people most affected by this particular phase of the problem are the teachers themselves. What are the teachers' constitutional rights. Is it constitutionally permissible for a court to require a board to put a particular teacher in a particular school when the teacher herself does not want to teach in that particular school and her employer does not desire to put her in that particular school? Is this not a form of involuntary servitude?

Many teachers live close to the schools in which they teach and most of them, both Negro and white, prefer to teach in schools that are nearby. Many of our teachers, both Negro and white, are also mothers and prefer to teach in the same school that their children are attending or at least at a school very nearby. The reason for this is obvious. Transportation problems are less. The teacher can take her children to school

with her and bring them home with her in the afternoon. Is this benefit to the teachers themselves to be discarded because of some alleged damage to students without regard to the teachers' wishes. Even if there is some damage to the students, what about the corresponding damage to the teacher who is arbitrarily up-rooted from a position she is happily holding because of some arbitrary percentage allocation imposed by the courts.

I can see that these problems may not be as severe in the area of admitting new teachers to existing vacancies. However, even here it would appear that the wishes of the teacher, Negro as well as white, should be taken into consideration.

Furthermore, teachers in this parish, both Negro and white, are represented by at least three organizations; Louisiana Teachers Association, the Classroom Teachers Association and Louisiana Education Association. Before this Court proceeds to render any final and binding ruling as to desegregation of teachers, should not these organizations be represented before the court to express the teacher's view? In fact, should not these organizations be properly made a party defendant in these suits before any decision is rendered affecting their future as such desegregation, or integration, might do?

As an example of the importance of this matter to individual teachers who are also citizens with constitutional rights, we refer the Court to Appendix VII attached to this petition, entitled "St. Landry

Teachers association—A Protest" which was adopted only this month. This is the first reaction of the teachers in only one parish and has been proposed for adoption by the Louisiana Teachers Association.

As pointed out above, there are many additional problems inherent in teacher desegregation that do not exist with respect to student desegregation. The District Court in this case did not permanently refuse to hear evidence on this question, he merely postponed such hearing until a later time when the basic desegregation of schools with respect to students was further along and the School Board and staff had more experience and knowledge in working with these problems.

In view of the many practical problems involved in teacher desegregation, as compared to student desegregation, and particularly in view of what we consider as grave constitutional questions as to the forcing of a teacher to teach in a school where she does not desire to teach and where her employer does not desire for her to teach, defendants respectfully submit that this Court should not require teacher desegregation at this time, and should leave this question to be determined by the District Courts at a more propitious stage of this transition after the legal and Constitutional questions involved have been fully explored and after presentation of evidence at the trial Court level.

CONCLUSION

The decision of the Court below will drastically affect the future of public education in our entire nation. Its most drastic and immediate effect will be felt in the 17 so called southern and border states and in the large cities of the north, mid-west, west and east. However, this decision will also affect the life of every child, both Negro and white, and public education in our nation, presumably, forever. The net affect of the likely deterioration of public education will be felt by the nation as a whole.

This nationwide importance, possible disastrous result, together with its apparent conflict with principles previously stated by this Court, its obvious conflict with most of the opinions of the other Circuit Courts of Appeal, and its drastic reversal of its own previous decisions, necessitates a review of the opinion of the Court below by this Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN F. WARD, JR.,
Counsel For Petitioner

CERTIFICATE OF SERVICE

I, John F. Ward, Jr., attorney for petitioner and a member of the Bar of the United States Supreme Court, do hereby certify that on this 20th day of June, 1967, I served copies of the foregoing petition for Writ of Certiorari on all attorneys for respondents by mailing same, postage prepaid, to their respective offices as shown below:

1. Jack Greenberg, Norman Amaker & James M. Nabrit, III, 10 Columbus Circle, New York, New York 10019
2. A. P. Tureaud, 1821 Orleans Avenue, New Orleans 16, La.
3. Johnnie Jones, 530 South 13 Street, Baton Rouge 2, Louisiana

JOHN F. WARD, JR.,
Attorney for Petitioner

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

CLIFFORD EUGENE DAVIS, JR., a minor by his father and next friend Clifford Eugene Davis, Sr., ET ALS

versus

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

CIVIL ACTION
NUMBER 1662

* * *

Once again this case concerning the desegregation of the public schools in the Parish of East Baton Rouge, Louisiana, is before the Court. On December 29, 1966, the United States Fifth Circuit Court of Appeals, by a two to one decision, handed down a most unusual decision—unusual because of its glaring inconsistencies, ambiguity, and sheer unconstitutionality. I refer to the case of *United States of America and Linda Stout, by her father and next friend, Blevin Stout v. Jefferson County Board of Education, et al,* _____F. 2d_____, with which six other cases were consolidated for hearing, and hereinafter referred to as the Jefferson case. The East Baton Rouge Parish School case was not involved in that decision. But by some stroke of magic, with no motion ever

having been filed for consolidation, the Baton Rouge case suddenly appeared consolidated with the other seven cases when the matter came up for "rehearing" before the Court sitting en banc. The en banc Court, by an eight to four decision, for all practical purposes upheld the original opinion. The dissenting opinions filed by Judges Gewin, Bell and Coleman clearly and meticulously point out the sheer absurdity and absolute unconstitutionality of the majority opinion. The majority opinion held that "The clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed'." But what it fails to state is that the same clock by which that Court is apparently working may well have "ticked the last tick" for true constitutional government in these United States. As Judge Gewin so aptly stated in his dissent, the opinion of the majority "has no substantial legal ancestors." There can, of course, be no such thing as true constitutional government in the United States if the Court is legally permitted, as that Court has done, to declare that the Constitution means one thing in seventeen states, and something else in the remaining thirty-three states. There are judges who have publicly stated their belief that the United States Supreme Court should, in fact, function as a "super legislative body" rather than as a court in the usual sense of the word. The majority opinion in the Jefferson case strongly indicates that there are those who believe that this should also be the function of the Courts of Appeals. When, in his dissent, Judge Gewin states that this decision "bends and twists the Constitution"

he exercises remarkable restraint. The fact is that the decision not only "bends and twists" the Constitution, it breaks and destroys it. It also defies and ignores the very Acts of Congress which it professes to be interpreting and enforcing. It completely ignores the constitutional requirement of separation of powers between the Executive Legislative, and Judicial branches of the Government when it undertakes to legislate as it has done in this case. And when it decrees that school boards (in the Southern and Border states only) must take affirmative action to "*integrate* students, faculties, facilities and activities" it either attempts to repeal, or it ignores completely the provisions of the Civil Rights Act of 1964 which specifically state:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C.A. 2000c-(b).
>
> ". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 42 U.S.C.A. 2000c-6(a)(2).

The Court neatly sidesteps these specific impediments to the legality of its decision by simply stating:

> ". . . the equitable powers of the courts exist independently of the Civil Rights Act of 1964."

The utter ridiculousness of the opinion as it attempts to distinguish between the law as it applies to de jure segregation and the law as it applies to de facto segregation is readily apparent. The Court concludes that its opinion states the law only as it applies to the seventeen Southern and Border states—the states in which it says segregation is of the "de jure" type rather than of the "de facto" kind. It states that its opinion does not attempt to state the law as to the remaining thirty-three states where, it says, segregation is of the "de facto" type. It then proceeds to attempt to legislate an end to *all* segregation in the schools of these seventeen states, without regard to whether or not the segregation remaining after the implementation of desegregation orders is really de facto segregation. It even goes to the extent of ordering the local school boards to close certain schools under certain conditions, and instructing them how to choose locations for new schools. It is hard to reconcile their assertion that their opinion only applies to certain states, and not to others, when they say in another part of their opinion that "What was true of an earlier Athens and an earlier Rome is true today: In Georgia, for example, there should not be one law for Athens and another law for Rome." Should there be one law for Louisiana and another for

New York, and one law for Mississippi and another for Illinois?

But assuming by the use of legal doubletalk we could somehow conclude that under the law as it presently stands it is only de jure segregation that is unconstitutional, the question arises as to what is the status of the law in these seventeen states with regard to areas where segregation is maintained by *choice* on a de facto basis? Is the majority of the Court so oblivious of the facts as to believe that de facto segregation does not exist in areas of the South as well as in the North? Indeed, are they so oblivious of the facts as to believe that de facto segregation, that is, segregation *by choice*, does not exist in this very City of Baton Rouge? The majority opinion states that "The only school desegregation plan that meets constitutional standards is one that works." Suppose the school desegregation plan already in operation in a given area *is* working to the extent that all students do, in fact, have a free and unfettered choice of the school which he will attend, and suppose the situation arises where it cannot be fairly said that there any longer exists "de jure" segregation but that segregation *does* continue to exist on a neighborhood, de facto, free choice basis. In such an event, does such an area then join the Northern states against whom this decision is not intended to operate; or does the operation of the statute then become enlarged to cover such de facto segregation simply because the area involved is located in one of the seventeen Southern or Border states? By what criteria is it to be decided when de jure

segregation ends and de facto segregation begins? Are these questions to be determined by the method used by the Department of Health, Education and Welfare in applying their so-called guidelines, or will the school boards be given an evidentiary hearing in a court of law to determine such an issue? It must be remembered that the school boards were not given such an evidentiary hearing in the present case on the question of whether or not the H.E.W. guidelines should be applied to the schools involved. That issue was never presented to the District Courts in which these cases originated, the Courts in which, according to law, litigation is supposed to originate. The Court of Appeals, sua sponte, injected this issue into the cases for the first time while they were supposedly "on appeal" before it. In view of this procedure, it would seem logical to conclude that it is now the intention of the Court of Appeals to take over the function of the District Courts insofar as these school desegregation matters are concerned. Apparently insofar, at least, as cases involving desegregation of schools are concerned, litigation may now start at the appellate level. I respectfully express my doubt of the wisdom of this procedure and agree with Judge Gewin when he says ". . . due process and sound judicial administration require, at the very least, an evidentiary hearing . . . It is unthinkable that matters that so vitally affect this phase of the national welfare should be decided in such summary fashion." Judge Bell put it another way in his dissent when he said that this decision of the majority amounts to an

"adjudication without any semblance of due process of law. It is an unprecedented procedure and a shocking departure from even rudimentary due process."

The Jefferson decision is apparently the final step in the Fifth Circuit Court of Appeals' determination to bring about not, as the law clearly requires, an end to forced segregation in public schools, but instead a complete, forced, total integration of the faces in every school. It seems to matter not that the Congress has specifically decreed otherwise, and it seems to matter not that such a result has never been required or suggested under the Constitution or laws of the United States as interpreted by the highest court of the land. As Judge Gewin says ". . . All things must yield to speed, uniformity, percentages, and proportional representation. . . ." The decree of the majority shows an obvious "determination . . . to achieve percentage enrollments which will reflect the kind of racial balance the [*court*] seeks to achieve."

But this racial balance was never contemplated by Congress when it passed the Civil Rights Act of 1964. In explaining the Bill to Congress, the then Senator Humphrey said:

> "The Bill does not attempt to integrate the schools . . . The fact that there is a racial imbalance per se is not something which is unconstitutional."

But in the Jefferson case the majority of the Court said:

> ". . . the 'personal and present' right of the in-

dividual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education."

This statement is difficult to understand in view of the fact that prior to the Jefferson case, this same Court, on at least nine different occasions, specifically approved the holding in the case of *Briggs, et al v. Elliott*, et al, 132 F. Supp. 776 (E.D.S.C. - 1955) wherein it was specifically stated that:

"The Constitution, in other words, does not require integration. It merely forbids segregation."

Now, for some strange and obscure reason, without any change in the law having been made by either the Congress or the United States Supreme Court, the holding in Briggs suddenly becomes "dictum" by which the Court of Appeals says it is not bound, at least insofar as the seventeen Southern and Border states are concerned. It is apparently the law elsewhere, but not here. In explanation of this "switch" the Court said:

"However, as this Court's experience in handling school cases increased, the Court became aware of the frustrating effects of Briggs."

And then, in order to avoid the frustration involved in following the law as clearly stated by both the Congress and the Supreme Court, the majority of the Court in the en banc hearing neatly sidestepped the whole affair by simply stating, without any legal justification whatsoever, that:

"The Court holds that boards and officials administering public schools in this Circuit have the af-

> firmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinion distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. . . . To the extent that earlier decisions of this Court . . . conflict with this view, the decisions are overruled."

The conclusion now reached by the Court of Appeals that the statement contained in the Briggs case that "The Constitution, in other words, does not require integration. It merely forbids segregation" is merely dictum by which it is not bound is interesting indeed. I assume that if the statement in Briggs had been to the effect that the Constitution *did* require integration, it would also have been considered to be mere dictum. If so, it could, of course, have no precedential value. And if such a statement in Briggs is dictum and not binding, then of course it must necessarily follow that a similar statement of another court, such as the Fifth Circuit Court of Appeals is mere dictum and not binding upon other courts in future cases.

When judicial precedent and specific enactments of Congress can be so lightly and summarily cast aside, and when in their place can be substituted a decree whose obvious purpose, as noted by Judge Gewin in his dissent, is a "determination . . . to achieve percentage enrollment which will reflect the kind of racial balance the [*court*] seeks to achieve," I can only say that I wholeheartedly agree with Judge

Hutchinson when he said in *Denzel Milton Lee v. United States of America*, 322 F. 2d 770 (CA 5—1963):

> ". . . I emphatically condemn and reject the majority view as simply personal decreeing and, as such, alien to this Circuit and to the law generally and as completely unauthorized."

It is far too late for anyone to take issue with the fact that the established law of the land now requires that there be no *forced segregation* in public schools. But it is equally well established in law that neither the Constitution nor the laws of the United States of America require forced integration of the races in public schools. The law is clear. It requires that public schools be maintained and operated, not as Negro schools and not as white schools, but as public schools. It requires nothing more nor less than that within the bounds of proper school administration all students have a free and unfettered choice of the school he wishes to attend, and that he has the right to be assigned to the school of his choice without regard to his race, color, religion, or national origin. If the plan adopted by a school system employs this criteria, and if the freely exercised choice of students or parents results in de facto segregation, that is merely an example of freedom of choice in operation. It is just as important that one's freedom to choose a school that does not happen to suit the fancy of the Court be protected and respected as it is to protect the rights of those who elect to attend the schools which the Court, in its infinite wisdom, thinks they should at-

tend. The majority opinion handed down in this case gives one the impression that the Courts are the guardians of the educational processes employed in this country. Search as I may, I have been unable to find authority for the assumption by the Court of such a duty. The primary function of the Courts is to decide cases and controversies—not to administer the local school systems. Regardless of how "frustrated" the Court of Appeals may become as its experience in handling school cases increases, such frustration is, in my humble opinion, no justification for its taking over, "lock, stock and barrel," the operation of the public school systems. It is one thing to adjudicate disputes between litigants, and it is quite another to carry the modern day theory of judicial activism to the extent demonstrated in this case.

No one will dispute the fact that, in the past, Negro children have been short changed when it comes to educational opportunity, especially in the South. Congress has attempted to alleviate this situation by the passage of various pieces of Civil Rights legislation. It is up to the Courts to interpret those Acts, along with the Constitution of the United States, and demand compliance therewith. If the legislation passed by Congress is inadequate then it is, of course, the prerogative of Congress to change it. If the Constitution is inadequate, then it should be amended by proper constitutional process. But in neither case should this Court, or any other Court, take it unto themselves to usurp the powers and functions of Congress and to change the law to make it conform to the way *they*

think the law ought to be. That is what has happened in this case. If the law providing for an end to forced segregation in public schools does not work in such a fashion as to give every child, white and negro alike, an honest, opportunity to freely choose the school he wishes to attend, then the law should be changed by proper legislative proccdures. It should not be changed by the bending and twisting process indulged in by the Court in this case.

When, as stated by Judge Gewin, the Constitution and laws of the United States can be so easily "bent and twisted," it is difficult to disagree with Judge Bell when he says that the type of standards set by the Court in this case "places school systems under men and not laws."

But since the District Courts in the Fifth Circuit seem now to have been completely stripped of all discretion insofar at least as the cases directly involved in the Jefferson decision are concerned, and since, even though never consolidated by proper legal procedure the East Baton Rouge Parish school case has somehow been included within the ambit of that decision, this Court now has no alternative but to comply with the mandate issued therein. That mandate says:

> "The Court reaffirms the reversal of the judgments below and the remand of each case *for entry of the decree attached to this opinion.*"

I agree with Judge Gewin when he says the effect of this mandate is that:

> "The effectiveness of the District Courts has been

> seriously impaired . . . Now his (the District Judge's) only functions are to order the enforcement of the detailed, uniform, stereotyped formal decree . . . and to receive periodic reports much in the same fashion as reports are received by an ordinary clerk in a large business establishment."

So, functioning in that capacity, I herewith enter the "detailed, uniform, stereotyped formal decree" that is attached to the majority opinion.

I concur with Judge Bell when he notes that because of the detailed character of this decree formulated by the Court of Appeals it is doubtful "that sufficient latitude is left to the District Courts to adjust such practical difficulties as may arise under the details of the decree." I can only assume that the Court of Appeals, whose decree I enter this day, has also assumed the duty of interpreting, applying, and enforcing compliance therewith as the need arises. While the decree does not specifically so state, I would nevertheless assume that the Court of Appeals does intend to retain jurisdiction over this matter for the issuance of such future orders and decrees as it may in its judgment deem necessary and advisable.

Decree will be entered accordingly.

Baton Rouge, Louisiana, May 8, 1967.

/s/ E. GORDON WEST
United States District Judge

APPENDIX II

Number of Negroes Registered in Each White School For Session 1963-1964

SENIOR HIGH SCHOOLS

	Grade 12
Baton Rouge High	14
Glen Oaks High	6
Istrouma High	3
Robert E. Lee High	4
TOTAL	27

Visiting Teacher Office
August 21, 1963

Number of Negroes Registered in Each White School For Session 1964-1965

SENIOR HIGH SCHOOLS

	Grade 11	*Grade 12*	*Total*
Baton Rouge High	20	17	37
Glen Oaks High	12	1	13
Istrouma High	2	0	2
Robert E. Lee High	4	5	9
TOTAL	38	23	61

Visiting Teacher Office
May 18, 1964

Registration Figures

Elementary Schools	*Grade 1*	*Grade 2*
Banks	78 (2)*	69 (2)
Dufrocq	37 (13)	27 (3)
Lanier	71 (1)	67
University Terrace	36 (6)	26 (2)
Westdale	26 (2)	32 (3)
Wyandotte	30 (1)	26
TOTAL	(25)	(10)

Senior High Schools	*Grade 10*	*Grade 11*	*Grade 12*
Baton Rouge Senior	534(44)	450(18)	473(22)
Glen Oaks Senior	276(10)	259(6)	217(11)
Istrouma Senior	582	557	509(1)
Robert E. Lee	245(5)	260(1)	224(5)
TOTAL	(59)	(25)	(39)

Total Number of Negro Registrants in Grades 1, 2, 10, 11 & 12—158

*The number in parenthesis is included in the first number listed.

August 16, 1965-66

ALW:bt

Number of Negroes Registered in Each White School For Session 1966-1967

ELEMENTARY

	Grade I	*Grade II*	*Grade III*	*Grade IV*	*Total*
Banks	3	3	4	1	11
Dufrocq	23	14	11	13	61
Lanier	0	0	0	0	0
University Terrace	7	4	1	2	14
Westdale Elementary	1	1	3	0	5
Wyandotte	4	4	0	5	13
TOTAL	38	26	19	21	104

SENIOR HIGH SCHOOLS

	Grade 10	*Grade 11*	*Grade 12*	*Total*
Baton Rouge Senior High	19	36	20	75
Glen Oaks Senior High	5	5	3	13
Istrouma Senior High	0	0	0	0
Robert E. Lee	26	7	1	34
TOTAL	50	48	24	122

Visiting Teacher Office
September 12, 1966

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

CIVIL ACTION NO. 1662

CLIFFORD DAVIS, ET AL.,
Plaintiffs,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Defendants.

BRIEF AMICUS CURIAE

May it please the Court:

The United States Supreme Court in *Shuttlesworth v. Birmingham Board of Education of Jefferson County, Alabama*, 358 US 101, 79 S.Ct. 221, by per curiam decision, affirmed the decision of the Federal District Court, 162 F. Supp. 372, 384, holding that the Alabama School Placement Law furnishes "the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered."

The Court noted that the placement law was "passed in an effort to meet and solve problems pre-

sented by the School Segregation Cases." (*Brown v. Board of Education*, 347 US 483, 74 S. Ct. 686 and *Brown v. Board of Education*, 349 US 294, 75 S. Ct. 753.)

Act 259 of the Legislature of Louisiana for 1958, as amended, was enacted after the Shuttlesworth case and contains in almost exact language the factors guiding student assignment which were attacked but upheld in the Shuttlesworth case.

The Supreme Court did not direct complete and universal integration at once, but directed that its interpretation of the Constitution be given effect with "*all deliberate speed*". The thoughtful consideration of those charged with the responsibility is thus necessarily involved and the primary responsibility for the conduct of the schools of this Parish is vested in the East Baton Rouge Parish School Board.

During the coming summer an election is to be held to choose the successors to present school board members, including both appointed and elected members, and this newly chosen board that will have charge of the conduct of the schools for four years should be allowed to implement the laws under which the schools are to be operated, with a reasonable certainty that such implementation will stand for the ensuing four years instead of being subject to almost immediate change.

We regret the decision of the Supreme Court in

the *Brown Case, supra.* We doubt that the Supreme Court, having once interpreted the Constitution as justifying separate but equal school facilities, ought to have felt itself free to strike down that decision especially in the face of the vast expenditures made by the States to comply with it. Nevertheless we recognize the duty of Your Honor to heed the mandate of the Supreme Court.

We believe that the mandate to proceed with all "deliberate" speed precludes the thought that the Courts will order desegregation at the uncontrolled wishes of Complainants. On the contrary we believe that Courts were directed to take into consideration the efficiency of the educational process, the ability of the student, the maintenance of true educational standards and other factors of vital importance to the community. On no other basis could the Supreme Court have approved the Shuttlesworth decision.

We believe an attempt to place every student in an integrated school without regard to his needs and qualifications would wreck the school system.

We believe that the interests of the community and its inhabitants of all races will be served by awaiting submission of a plan from a fully elected school board.

Accordingly, we suggest to the Court that, in keeping with the language and spirit of the Supreme Court decision, action herein should be deferred until 60 days

after the 1962 election of the East Baton Rouge Parish School Board.

Respectfully submitted,

/s/ C. C. BIRD

/s/ H. PAYNE BREAZEALE

/s/ C. V. PORTER

/s/ L. W. BROOKS

/s/ BEN R. MILLER

/s/ CALVIN E. HARDIN, JR.

/s/ CARLOS G. SPAHT

/s/ ROLAND C. KIZER

/s/ F. R. BLANCHE

/s/ G. T. OWEN, JR.

/s/ VICTOR A. SACHSE

CERTIFICATE

I, one of the attorneys on the foregoing brief amicus curiae, certify that copies thereof have been served on counsel of record for the plaintiff, namely: A. P. Tureaud, Attorney at Law, 1821 Orleans Street, New Orleans, Louisiana, and upon Miss Kathleen Ruddell, United States Attorney for the Eastern District of Louisiana and also upon District Attorney Sargent S. Pitcher, Attorney for the East Baton Rouge Parish School Board, and upon Attorney General Jack P. F. Gremillion, Attorney General of the State of Louisiana, by mailing a copy thereof with postage prepaid to each properly addressed.

Baton Rouge, Louisiana, March 8, 1962.

/s/ VICTOR A. SACHSE
Victor A. Sachse

APPENDIX IV

Baton Rouge Committee for Public Schools

DECLARATION OF PRINCIPLES

The United States District Court has ordered the School Board of the Parish of East Baton Rouge to present a plan for the orderly desegregation of public schools.

Our School Board has indicated that it will obey this order and will present a plan to the Court. However difficult this task may be, we believe that the School Board will be acting wisely, and in the best interest of the education and safety of our children, by presenting such a plan.

If the School Board should fail to present a plan, as ordered by the Court, this would not prevent desegregation of the schools. In that event, the Federal Judge would have no choice (under established law) but to devise a plan for our schools.

Our School Board was elected to direct public education and preserve our public school system. We believe that an acceptable plan, prepared by our own well-informed School Board, would be less disturbing to our community than a plan provided by the Court.

We support the School Board of this Parish for its dedicated and courageous service in this difficult situation.

* * *

Baton Rouge is now faced with the same situation that has recently confronted other Southern cities.

This Parish must now choose whether or not it will follow the path of law and order. What is done here now will determine the welfare, and the economy, of the entire Baton Rouge area for years to come.

We believe that the course to be followed, by our people and by our public officials, should be governed by the following principles:

1. *Public education must be preserved.*

   Our children are entitled to a schooling uninterrupted by violence and danger.

2. *Law and order must be maintained.*

   This requires compliance with the final decisions of our Courts. Any other course would result in violence and chaos.

3. *The right of parents to send their children to private schools should be recognized.*

   However, we believe that a private school system cannot become an adequate substitute for the public school system.

We join together in public support of these principles.

APPENDIX V

A DECLARATION OF PRINCIPLES

Relative to our Urgent School Problem

Public education in Louisiana must be preserved.

The people of each parish of the State, in accordance with the democratic concept of local self government, should be free to determine the basis on which their schools should be operated in compliance with the orders of the Federal Court.

Preservation of law and order in Louisiana requires compliance with the final decisions of the United States Supreme Court; any other course would result in chaos.

We believe that public education is reserved to the States and steps should be taken to enlist the aid and support of citizens throughout the nation with the view of eventual amendment of the constitution of the United States in order to preserve the right of the States in education.

Although the private school system cannot become an adequate substitute for the public school system, and much less supplant it, the right of parents to send their children to private schools should be recognized.

The time has come for the reasonable men and women of Louisiana to express their views and to assume positions of leadership in this critical social problem in order that unity may be restored to our people.

APPENDIX VI

NOMINATION FORM FOR THE NEA-THOM McAN SCHOOL BOARD AWARD

Grades are a necessary adjunct to school. Grading systems come in all kinds—those using grades as pinpointed as "98" or "62" and as broad as "S" and "U". Students are the primary targets for grading or rating, but the process does not stop with them: also graded are schools, school systems and many school employees.

And even school boards can be rated.

Few grades of "U" would be given to school boards anywhere, since, being an elected body, significant public disapproval would soon result in their unseating. The grade given would usually be "S": for "satisfactory."

But some deserve an "S" standing for something more than "satisfactory"—for, perhaps, "special," or "superior," or even "superb!"

The East Baton Rouge Parish School Board's "S" mark surely stands for this last-named quality—"superb."

Twenty-five years ago, the local school board represented people of a sleepy little river parish lolling on the banks of the Mississippi—an easy-going parish. Today East Baton Rouge Parish, is an emerging giant made up of 275,000 individuals—increasing at the rate of 300 new families a month. In less than a quarter century, the school population has jumped from 18,000 to 58,000; school properties from $2,600,000 to

$70,812,000 in value and instructional school personnel from 830 to 2,591 employed.

It is easy, during a time of such tremendous expansion, for a school board trying to keep up with burgeoning needs to feel overburdened. Simply keeping up, under the circumstances, is termed "satisfactory." But consider a school board under such urgent necessities not only keeping up with, but outpacing the needs. This has been the accomplishment of the East Baton Rouge Parish School Board. In planning, in administration, in support of consistent betterment of each facet of the educational program, they have excelled.

Perhaps their most clearly realized accomplishment so far lies in the upgrading of salaries and of personnel—both in quality and in number.

Teacher-pay in Louisiana, being lower than the national average, results in the loss of many good teachers to industry, as well as loss of good potential teachers to colleges other than colleges of education. The East Baton Rouge Parish School Board, by doing an outstanding job of promoting a local sales-tax in support of teacher-pay and various enrichment programs, in face of great opposition, was instrumental in a substantial local salary increase in 1966, making the parish a drawing-card for the better teachers in the area. In securing passage of the sales-tax proposal, board members presented two round-tables on television, and had more than thirty individual speaking engagements, and also contributed substantially to the cost of the campaign as individuals.

Our local salary schedule now averages $800.00 above the state minimum. The sales tax will yield this school year $4,700,000 and is expected to yield $5,381,000 in 1968-69. This gives the school board a permanent source of revenue for upgrading the number and quality of teachers locally employed.

In addition to better pay, school enrichment programs have been emphasized. In 1966, East Baton Rouge Parish elementary schools were WITHOUT ONE SINGLE ELEMENTARY LIBRARIAN. This year, TWENTY-SIX NEW ELEMENTARY LIBRARIANSHIPS were created, to be followed next year by TWELVE MORE, and ANOTHER TWELVE the next to make FIFTY. COUNSELORS increased from thirty-nine in 1965-66 to FIFTY-ONE in 1966-67, with a planned total of FIFTY ADDITIONAL COUNSELORS by 1967-68, several to be placed in elementary schools, which in 1965-66 had none.

The parish ELEMENTARY PHYSICAL EDUCATION program had NO certified physical education personnel previous to 1965, but now has SIXTEEN, and plans for a total of FIFTY by 1969.

The ELEMENTARY AND JUNIOR HIGH SCHOOL MUSIC PROGRAM "shared" a few teachers of music. A total of TWELVE additional elementary music teachers are planned by 1969.

Additional teachers to be hired by 1968-69 in these four areas alone number 162.

Unlike some other states, Louisiana has no mandatory kindergarten program. A START toward a

LOCAL SUMMER KINDERGARTEN program, parish supported, was made in the summer of 1966. A SIX-WEEK PROGRAM at centrally-located elementary schools involved 244 teachers teaching 3400 students.

Great strides are also apparent in the local ADULT EDUCATION PROGRAM. From 1965-66 to '66-67 STUDENTS INCREASED from 412 to 1,336; TEACHERS, from 19 to 55; and CLASSES, from 19 to 55, while the MONEY expenditure rose from $4,747 to $40,000.

In order to help get the sales tax passed, the East Baton Rouge Parish School Board published a brochure explaining "59,000 Reasons" (each reason, a student) that the local voters should support their program for a progressive school system. A copy is attached. Because of the tremendous effort and interest of the East Baton Rouge Parish School Board the goals listed in this brochure are fast becoming realities.

And all of this was done as the East Baton Rouge School Board provided leadership for integrated efforts among the teachers. Negroes and Whites worked in close association to get this program for enrichment enacted. Not once did they consider so limited a goal as just a teacher pay raise alone. ALL the goals listed in the brochure were backed by ALL the teachers—backed not only by moral support but by financial support ($12,000 worth) to advertise the program. Leading the move toward support of the goals was the school board, "digging down deep" and digging down FIRST to spearhead financial support.

Students—59,000 of them—were the "reasons" for the school board's goals. The SALES TAX, in large measure because of the actions and interest of the East Baton Rouge Parish School Board, IS A REALITY; the GOALS, again "because of the actions and interest of the East Baton Rouge Parish School Board," ARE FAST BECOMING REALITIES.

APPENDIX VII

St. Landry Parish Teachers Association
Opelousas, Louisiana

A PROTEST

We, the members of the St. Landry Parish Teachers Association do hereby, protest the discriminatory application of guidelines written by HEW and subsequent decree of the U. S. 5th Circuit Court of Appeals imposed by the U. S. District Court, Western District of Louisiana, on the teachers of the St. Landry Parish School System, members of the Board, the administrative staff and the parents and children of St. Landry Parish. We, herewith, set forth the grievances committed against us by the aforesaid guidelines and courts. We appeal to our governmental agencies, executive, legislative and judicial, and to our citizenry to work together to correct or eliminate these grievances:

(1) The constituted authority of the school boards has been superceded by HEW's guidelines and the Court Order, Civil Action 10,912. The educational objectives of the School Board are and have been nullified. The court order takes from that body the authority to locate school construction where it is economically feasible, freedom to hire the best qualified teacher for a specific position, or reassign teachers where they can be happy and successful in their work. Further, it mandatorily orders that races must be mixed on a proportional representation of administration, teachers, and pupils.

(2) "Tenure of teachers in the system shall not

be used as an excuse for failure to comply with this provision." This portion of the decree summarily destroys the teachers contractual rights and is ex post facto with respect to such rights.

(3) The voiding of contractual rights and the discriminatory and arbitrary reassignment of tenured teachers as stated in the decree, will deprive these teachers of financial security through relocation of residence, and the ancillary disruption of the families' religious, social and civil connections.

(4) Any implementation of the principles of reassignment can only lead to early retirement of our most dedicated and experienced teachers, wholesale resignation of those not eligible for retirement, and the nullification and abortion of our recent recruitment drives for teacher vocations. The present shortage of qualified teachers along with the aforementioned conditions will lead to chaos and the complete destruction of our school system.

(5) The purported reasons for these guidelines are to eliminate race as a consideration in the operation of our schools, however, the decree is self immolating, in that proportional assignment of teachers and students are mandatory.

(6) The unilateral application of non-statutory guidelines as issued by HEW and subsequently encompassed in the decree of the Fifth Circuit Court of Appeals is without legislative origin and the carte blanche extension of such guideline authority in the future destroys the principle of "government insti-

tuted among men, deriving their just powers from the consent of the governed" upon which the very foundation of our government was laid.

In conclusion we hold that the 14th amendment to the United States constitution applies to all men of all races and of all creeds, and regardless of previous condition of servitude (including teachers) and that our rights as employees and citizens should not be abrogated in an attempt to secure privileges of a particular group.

APPENDIX VIII

KU KLUX KLAN REPORT

ST. ANTHONY HIGH SCHOOL HAS WATER CUTOFF

A heart-broken integrationist priest recently announced closure of St. Anthony High School in Baton Rouge due to a sudden financial crisis–responsible minded Catholics rejected their priest's mixing plans and withdrew financial support from the school. Knowing this action will deter mixing plans in other schools as well, the KKK commends those parents who had the fortitude to standup and be counted.

VIC BUSSIE DEFEATED ONCE MORE

The AFL-CIO carpet bagger, who represents himself and not the men of his union, has been dealt another bitter defeat (along with McKeithen, Schiro, and Dumas) as the conservative state legislature turned thumbs down on urban renewal. Some representatives say that if you want a bill defeated just get "kiss-of-death" Bussie to support it.

RED CHINA AND THE NUCLEAR BOMB

Of the 14 Chinese scientists associated with the development of Red China's nuclear bomb, 12 received their scientific training in foreign universities. Among those universities are Cambridge, University of California, California Institute of Technology, Massachusetts Institute of Technology and Princeton.

A GOOD IDEA

It has been suggested that Mr. Robert Aertker, East Baton Rouge Parish Superintendent of Education, and his flunky school board members resign their positions and teach at Scotlandville High School this fall. The KKK agrees and feels sure that they will be well qualified. Mr. Aertker resides at 8864 Trinity Avenue, Baton Rouge; his phone number is WA 4-1845.

TWO-TERM AMENDMENT

It is estimated that of the total votes recently cast for Amendment No. 1 only 27% were actually casted in support of our present governor. Total cost of that preliminary campaign: $550,000.00, a large fraction of the more than $1,800,000.00 which backers have invested in McKeithen.

McKEITHEN-AYCOCK DEAL

Many conservatives were amazed and disgusted upon learning that Taddy Aycock was withdrawing from the governor's race. Many conservatives wonder why Mr. Aycock was withdrawing. Could it possibly be for $100,000.00 cash and the understanding that Big John would step down in 1970 and run against Ellender for the U.S. Senate seat?

PREDICTION

Watch for once a week segregationist Russell Long to come out 100% *against* Big John in the governor's race. Many doubt that this would help him in his own endeavors—he's too far gone.

B-968, 6-67